No. 90-285

In the Supreme Court of the United States

OCTOBER TERM, 1990

LITTON FINANCIAL PRINTING DIVISION,
A DIVISION OF LITTON BUSINESS SYSTEMS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS RESPONDENT SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably determined that the union's post-contract expiration grievances about the employer's layoff of employees were not arbitrable under the contract.

II

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Printing Specialties District Council No. 2, as successor to Printing Specialties District Council No. 1, was a petitioner/intervenor in the court of appeals and is a respondent here.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 893 F.2d 1128. The decision and order of the National Labor Relations Board (Pet. App. B1-B28) are reported at 286 N.L.R.B. 817.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1990. A petition for rehearing was denied on May 31, 1990. Pet. App. D1-D2. The petition for a writ of certiorari was filed on August 14, 1990, and was granted on November 13, 1990.[1] The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

[1] This Court granted the petition limited to the second question presented. See J.A. 3.

STATUTORY PROVISIONS INVOLVED

Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (5), provides:

> (a) It shall be an unfair labor practice for an employer –
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 8(d) of the Act, 29 U.S.C. 158(d), provides in relevant part:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *.

Section 7 of the Act, 29 U.S.C. 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

STATEMENT

A. The Development Of The Board's Rule Regarding Arbitration Of Post-Contract Expiration Grievances

1. Under Sections 8(a)(5) and 8(d) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and 158(d), an employer must bargain "in good faith with respect to wages, hours, and other terms and conditions of employment." *Ibid.* In order to promote industrial peace by fostering an atmosphere conducive to serious negotiations on a new contract, the Board has long recognized that the expiration of a collective bargaining agreement generally freezes the existing terms and conditions of employment. See *NLRB* v. *Katz*, 369 U.S. 736, 743 (1962). Consequently, the Board's well-established rule provides that an employer may not, without first bargaining to impasse, unilaterally abrogate an existing contractual grievance procedure, nor may it refuse to process grievances under the procedure, even after the contract has expired.[2] As the Board has observed, such unilateral actions undermine a union's status as exclusive bargaining representative of the

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[2] See, *e.g.*, *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. 53, 54-55 (1987); *Lucas County Farm Bureau Coop. Ass'n*, 218 N.L.R.B. 1150, 1151 (1975), enforced, 557 F.2d 1227, 1228 (6th Cir. 1977); *Celotex Corp.*, 146 N.L.R.B. 48, 59-60 (1964), enforced, 364 F.2d 552, 554 (5th Cir.), cert. denied, 385 U.S. 987 (1966); *Bethlehem Steel Co.*, 136 N.L.R.B. 1500, 1503 (1962), enforced in relevant part, 320 F.2d 615, 620 (3d Cir. 1963), cert. denied, 375 U.S. 984 (1964).

employees. *Hilton-Davis Chem. Co.*, 185 N.L.R.B. 241, 243 (1970).

Union security and dues-checkoff clauses do not survive, by operation of the Act, expiration of the collective bargaining agreement because "[t]he acquisition and maintenance of union membership cannot be made a condition of employment except under a contract which conforms to the proviso to Section 8(a)(3)." *Bethlehem Steel Co.*, 136 N.L.R.B. 1500, 1502 (1962); see *Southwestern Steel & Supply, Inc.* v. *NLRB*, 806 F.2d 1111, 1113 (D.C. Cir. 1986). The Board initially held that arbitration clauses in collective bargaining agreements likewise did not survive expiration of the contract, on the ground that the duty to arbitrate is wholly contractual and cannot survive by operation of law. *Hilton-Davis Chem. Co.*, 185 N.L.R.B. at 242.[3] The Board therefore concluded that an employer does not violate Section 8(a)(5) of the Act by refusing to arbitrate grievances arising between the expiration of one contract and agreement on another. *Ibid.*[4] As the Board there explained:

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[3] In *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960), this Court recognized that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Accord *Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368, 374 (1974); see also *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 57-58.

[4] On the other hand, the Board has long held that a wholesale refusal to arbitrate grievances under a contract to arbitrate does violate Section 8(a) (5), since that refusal amounts to a repudiation of part of the bargain reached during negotiations. See, *e.g.*, *GAF Corp.*, 265 N.L.R.B. 1361, 1364 (1982); *Paramount Potato Chip Co.*, 252 N.L.R.B. 794, 796-797 (1980); *Independent Stave Co.*, 233 N.L.R.B. 1202, 1204 (1977), enforced in pertinent part, 591 F.2d 443, 446-448 (8th Cir.), cert. denied, 444 U.S. 829 (1979). However, a refusal to arbitrate a particular grievance or class of grievances, by itself, is not a violation of the Act, because a breach of contract does not automatically amount to a repudiation of the contract. See, *e.g.*,

> Absent mutual consent, the parties revert to the statutory scheme of "free" collective bargaining wherein each party must attempt in good faith to reach agreement, but is under no statutory mandate to reach an agreement or to forfeit its rights to utilize its economic power if no agreement can be achieved.

Ibid. The Board accordingly took the position that "[i]f the contract expires, the arbitration commitment expires." *S & W Motor Lines, Inc.*, 236 N.L.R.B. 938, 948 (1978), modified on other grounds, 621 F.2d 598 (4th Cir. 1980).

2. In *Nolde Bros.* v. *Local No. 358, Bakery Workers*, 430 U.S. 243, 250-251 (1977),[5] this Court reaffirmed "that the arbitration duty is a creature of the collective-bargaining agreement and that a party cannot be compelled to arbitrate any matter in the absence of a contractual obligation to do so." See, *e.g.*, *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). Nonetheless, the Court held that "termination of a collective-bargaining agreement [does not] automatically extinguish[ ] a party's duty to arbitrate grievances arising under the contract." 430 U.S. at 251.

The Court noted that "[w]hile the termination of the collective-bargaining agreement works an obvious change in the relationship between employer and union, it would have little impact on many of the considerations behind [the parties'] decision to resolve their contractual differences through arbitration." *Nolde*, 440 U.S. at 254. The

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Indiana & Michigan Elec. Co., 284 N.L.R.B. at 60 n.7; *GAF Corp.*, 265 N.L.R.B. at 1364-1365; *Central Rufina*, 161 N.L.R.B. 696, 700 (1966); *United Tel. Co.*, 112 N.L.R.B. 779, 781-782 & n.4 (1955).

[5] *Nolde* involved a union's action under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, to compel arbitration of a dispute over severance pay that arose after the expiration of the collective bargaining agreement. 430 U.S. at 244-248.

Court further observed that "the parties drafted their broad arbitration clause against a backdrop of well-established federal labor policy favoring arbitration as the means of resolving disputes over the meaning and effect of collective-bargaining agreements," and the "established * * * strong presumption favoring arbitrability" in order to effectuate that policy. *Ibid.* The Court therefore concluded that

> [t]he parties must be deemed to have been conscious of this policy when they agree[d] to resolve their contractual differences through arbitration. Consequently, the parties' failure to exclude from arbitrability contract disputes arising after termination, far from manifesting an intent to have arbitration obligations cease with the agreement, affords a basis for concluding that they intended to arbitrate all grievances arising out of the contractual relationship. In short, where the dispute is over a provision of the expired agreement, the presumption favoring arbitrability must be negated expressly or by clear implication.

Id. at 255.

In light of *Nolde,* the Board reconsidered the rule announced in *Hilton-Davis* that the duty to arbitrate expires with the contract. In *American Sink Top & Cabinet Co.,* 242 N.L.R.B. 408 (1979), the Board held that the employer had violated Section 8(a)(5) and (1) of the Act by refusing to process—and arbitrate, if appropriate—a grievance over a discharge occurring nearly three months after the contract expired. On the basis of the presumption adopted in *Nolde,* the Board explained that "[t]he grievance's basis is 'arguably'—at least—the contract, and there is no reason to conclude that the parties had intended the arbitration provisions to end with the contract's term." 242 N.L.R.B. at 408.

In the wake of *American Sink Top,* the Board had difficulties applying its decisions regarding the post-expiration duty to arbitrate grievances. Compare *Cardinal Operating Co.,* 246 N.L.R.B. 279, 284, 287-288 (1979) (applying *Hilton-Davis* without citing *American Sink Top* or *Nolde*) with *Digmor Equip. & Eng'g Co.,* 261 N.L.R.B. 1175, 1175-1176 (1982) (applying *American Sink Top* where employer refused to arbitrate post-expiration discharge based in part on pre-expiration conduct).

3. This uncertainty led the Board, in *Indiana & Michigan Elec. Co.,* 284 N.L.R.B. 53 (1987), to clarify its rule regarding the post-expiration duty to arbitrate grievances. The Board noted *Nolde*'s strong presumption that the contractual obligation to arbitrate grievances arising under the contract extends to post-expiration disputes,[6] and concluded that a blanket refusal to arbitrate post-expiration grievances would violate Section 8(a)(5) and (1) of the Act, absent strong evidence that the parties intended to exclude all such disputes from arbitration. 284 N.L.R.B. at 59-60. But the Board read *Nolde* as requiring an employer to arbitrate only those post-expiration grievances "arising under" the expired contract, *i.e.,* disputes concerning "contract rights capable of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceable after the contract expires." *Id.* at 60. Accordingly, to the extent *American Sink Top* suggested that *all* post-expiration grievances based on terms of the expired contract are arbitrable, the Board declined to follow that decision. *Id.* at 60 n.9.[7]

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[6] In this regard, the Board determined that *Nolde* did not undermine that aspect of *Hilton-Davis* holding that the Act does "not impose a duty to adhere to the arbitration procedure independent of any contractual commitment to do so." 284 N.L.R.B. at 58.

[7] In *Indiana & Michigan Elec. Co.,* the Board concluded that the employer had violated the Act by refusing to arbitrate any post-

B. The Present Controversy

1. Petitioner prints bank checks at six plants. For a number of years, petitioner and Printing Specialties District Council No. 2 (union) were parties to collective bargaining agreements.[8] During the period relevant to this proceeding, the union represented production and maintenance employees at petitioner's Santa Clara facility. The last contract between petitioner and the union expired on October 5, 1979. Pet. App. A4.

That contract, which generally provided that "the stipulations set forth shall be in effect for the time hereinafter specified," J.A. 22, contained a grievance-arbitration procedure for resolving "[d]ifferences that may arise between the parties * * * regarding this Agreement and any alleged violations of the Agreement, [and] the construction to be placed on any clause or clauses of the Agreement," J.A. 34.[9] With respect to layoffs, the contract provided that

expiration grievances. 284 N.L.R.B. at 61. The Board determined, however, that the grievances at issue did not "arise under" the expired contract and thus declined to order the employer to arbitrate them. The Board pointed to the fact that the

> grievances were triggered by events or conduct that occurred after the expiration of the contracts. None of the rights invoked were worked for or accumulated over time, and there is no other indication that the parties contemplated that such rights could ripen or remain enforceable after the contracts expired.

Ibid.

[8] The union was the successor to Printing Specialties District Council No. 1. Pet. App. A4.

[9] The contract calls for the employee first to submit the grievance to his immediate supervisor (or the Shop Steward), and then to submit it in writing to a panel consisting of the Plant Manager, the Shop Steward, and a union representative. If the grievance remains unresolved, the parties may then proceed to binding arbitration. J.A. 34-35.

The contract provides that "[s]hould an employee have a grievance as to the interpretation or application of the terms of this Agreement,

> [w]henever [petitioner] intends to lay off all or part of [its] employees, [it] shall give notice of such intention not later than quitting time of the previous working day. It is also understood that in case of layoffs, lengths of continuous service will be the determining factor if other things such as aptitude and ability are equal.

J.A. 30.

Petitioner used two types of printing processes to print bank checks at the Santa Clara facility—the "cold-type" process and the "hot-type" process. In July 1980, petitioner decided for economic reasons to convert the facility entirely to the "hot-type" process and, as a result, laid off ten employees and gave them severance pay. Petitioner did not notify the union about the layoffs or give it an opportunity to bargain.[10] Moreover, petitioner did not lay off those employees on the basis of seniority. Instead, petitioner laid off employees who worked exclusively or primarily on the "cold-type" equipment. Pet. App. A4-A5.

The union filed separate but identical grievances for each laid-off employee, alleging "unjust layoff . . . out of seniority." Pet. App. A6. The union asked petitioner for a meeting to discuss the layoff decision and its impact on the employees, and "request[ed] that pending resolution of this matter that each and all of them be reinstated to their employment." J.A. 61. Petitioner, noting that the contract

there shall be no suspension or interruption of work on account of such matter * * *." J.A. 34-35. The contract also contains a general "no-strike" clause limited to the "term of [the] Agreement." J.A. 34.

[10] At the time of the layoffs, petitioner was refusing to bargain with the union, relying on its objections to the 1979 decertification election that the union had won. In a separate proceeding, the Board found that petitioner's general refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1). *Litton Financial Printing Division*, 256 N.L.R.B. 516 (1981).

had expired, refused to process the grievances under the contractual grievance and arbitration procedure. It also refused to bargain over the decision to lay off the employees, but offered to discuss the "effects" of the layoff on employees. Pet. App. A6; J.A. 65.

2. In response to unfair labor practice charges initiated by the union, see J.A. 7-9, the National Labor Relations Board concluded that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain about the layoff decision, by refusing to accept and process the layoff grievances, and by unilaterally repudiating the contractual arbitration procedure. Pet. App. B1-B20.[11] The Board noted that, under *First Nat'l Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981), "employers are obligated to bargain over the effects on unit employees of management decisions" even where those decisions "are not themselves subject to the obligation to bargain." Pet. App. B9. "[U]nder the facts of this case," the Board determined, petitioner's "decision to lay off employees [was] not so inextricably intertwined with the conversion decision as to render impossible bar-

[11] The Board also concluded that petitioner had violated Section 8(a)(5) and (1) by dealing directly with employees without first notifying the union. Pet. App. B2 n.4. Since petitioner did not challenge that conclusion, the court of appeals summarily enforced that aspect of the Board's order. *Id.* at A5 n.2. That issue is not before this Court.

Chairman Dotson filed a dissenting opinion. Pet. App. B21-B28. In his view, there was insufficient evidence "to establish [petitioner's] 'wholesale repudiation' of the arbitration procedure." *Id.* at B23. With respect to the employees' grievances, he concluded that since they "did not 'arise under' the contract, * * * [petitioner] had no obligation * * * to process them." *Id.* at B24. Moreover, Chairman Dotson determined that, "under all the circumstances presented * * *, the layoff may not properly be classified as an effect of [petitioner's] conversion decision." *Ibid.*

gaining over the layoff decision." *Ibid.*[12]

Following its recent decision in *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. 53 (1987), the Board also concluded that petitioner had violated Section 8(a)(5) and (1) by refusing to accept and process the layoff grievances and by unilaterally repudiating the contractual arbitration procedure. Pet. App. B5-B9. In light of *Indiana & Michigan Elec. Co.*, the Board here rejected petitioner's contention that there was no obligation to process the grievances through the grievance procedure because the contract had expired. Moreover, the Board concluded that petitioner could not repudiate the arbitration provisions of its expired contract merely because the contract specified that the "stipulations set forth shall be in effect for the time hereinafter specified." Pet. App. B3; see *id.* at B5-B6. The Board pointed out that such language "is not sufficient to rebut the *Nolde* presumption of arbitrability because it does not reveal the parties' intentions 'as to the pertinent issue, which is, whether the arbitration clause *survives* expiration and, if so, which post-contract grievances are arbitrable.' " *Id.* at B6 (quoting *Teamsters Local 703* v. *Kennicott Bros. Co.*, 771 F.2d 300, 303 (7th Cir. 1985) (emphasis in original)).

Turning to the appropriate remedy, the Board, among other things, ordered petitioner (upon request) to bargain about the layoffs and to process the layoff grievances through the contractual grievance procedure. Pet. App. B15-B17, B18-B19. But the Board refused to order peti-

[12] The Board found that once petitioner decided to convert to the hot-type process, it had a number of alternatives—other than layoffs—for implementing that decision: petitioner could have retained cold-type employees to work on hot-type equipment, transferred those employees to its other plants or to other positions within the same plant, reduced the workweek for all employees, or adopted a system of rotating layoffs. Pet. App. B10.

tioner to arbitrate the layoff grievances, rejecting the union's contention that those grievances "arose under" the expired contract. The Board found that the layoffs that triggered the grievances occurred after the expiration of the contract, that the asserted contractual right—the right to layoff by seniority if other factors were equal—was not a "right worked for or accumulated over time," and that there was no evidence that "the parties contemplated that such rights could ripen or remain enforceable even after the contract expired." *Id.* at B16 (quoting *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 60).

3. The court of appeals enforced the Board's order, but reversed and remanded for further proceedings that aspect of the Board's decision concluding that the layoff grievances were not arbitrable. Pet. App. A1-A22.[13] Reviewing the Board's conclusion that the layoff grievances did not "arise under" the expired contract, the court of appeals determined that the Board had erroneously focused on "the event (the layoff) that sparked the dispute, and not [on] the substantive contract-based rights (seniority protection against layoff) that were allegedly violated." *Id.* at A19. The court pointed out that, in two later decisions,[14] the Board had found post-expiration disputes involving application of contractual seniority clauses arbitrable; the court viewed those decisions as inconsistent with the Board's holding here. *Id.* at A19-A20. Moreover, the court concluded that the Board's *Indiana & Michigan* rule, by

[13] The court of appeals upheld the Board's determination that petitioner's layoff decision was a mandatory subject of bargaining, and thus enforced that part of the Board's order. Pet. App. A11-A12. That aspect of the court of appeals' judgment is not before the Court as a result of the limited grant of certiorari. See J.A. 3; note 1, *supra*.

[14] *United Chrome Prods., Inc.*, 288 N.L.R.B. 1176 (1988); *Uppco, Inc.*, 288 N.L.R.B. 937 (1988).

focusing on whether the grievance was based on rights accruing under the contract before termination, was inconsistent with *Nolde* as well as with Ninth Circuit decisions construing Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. 185. Pet. App. A20-A21 (citing, *e.g.*, *Local Joint Executive Bd., Culinary Workers Union, Local 226* v. *Royal Center, Inc.*, 796 F.2d 1159 (9th Cir. 1986), cert. denied, 479 U.S. 1033 (1987)).[15]

SUMMARY OF ARGUMENT

A. This Court has repeatedly held that "[i]f the Board adopts a rule that is rational and consistent with the Act * * * then the rule is entitled to deference from the courts." *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987). Deference is appropriate where the Board's decision is based on a policy judgment designed to implement the broad purposes of the statute. "It is the Board," not the courts, "on which Congress conferred the authority to develop and apply fundamental national labor policy." *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 500 (1978). If the Board is to accomplish that task, it "necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions." *Id.* at 501. Deference is particularly due the Board's remedial order, which "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those

[15] Since it concluded that the Board "erred" in finding that "the layoff grievances in this case were not arbitrable, on the ground that they did not 'arise under' the expired [contract]," the court of appeals "assume[d] without deciding that the Board's *Indiana & Michigan* decision [insofar as it relies on Section 301 precedent such as *Nolde*] is a reasonably defensible construction of the section 8(a)(5) duty to bargain." Pet. App. A18. As the court of appeals pointed out, petitioner did "not challenge the general principles of *Indiana & Michigan*." *Id.* at A16 n.8.

which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943).

B. The Board's rule set forth in *Indiana & Michigan Elec. Co.* regarding arbitration of post-contract expiration grievances is plainly "rational and consistent with the Act." *Fall River Dyeing*, 482 U.S. at 42. In view of this Court's recognition in *Nolde* of the strong presumption that the contractual obligation to arbitrate grievances arising under the contract extends to post-expiration disputes, the Board has properly determined that a blanket refusal to arbitrate post-expiration grievances would violate the Act, absent strong evidence that the parties intended to exclude such disputes from arbitration. That aspect of the Board's rule is unexceptionable, especially in view of the scope of the duty to bargain under Section 8(a)(5) of the Act.

The Board has appropriately determined that only those post-expiration grievances concerning "contract rights capable of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceable after the contract expires" must be arbitrated under the contract. *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 60. That limitation reflects the Board's "striking [a] balance to effectuate national labor policy." *NLRB* v. *Truck Drivers*, 353 U.S. 87, 96 (1957). The Board's rule furthers the use of arbitration as a means of resolving labor-management disputes, but at the same time recognizes that resort to arbitration over particular disputes ultimately depends on the parties' mutual consent, as reflected in the collective bargaining agreement. Accordingly, to the extent the court of appeals concluded that the Board's rule is an impermissible construction of the Act, the decision below is wrong.

C. Under the *Indiana & Michigan* rule, the Board here reasonably determined that, although petitioner's blanket refusal to arbitrate the union's post-contract expiration grievances violated the Act, petitioner was not obligated to arbitrate the particular layoff grievances at issue since they did not "arise under" the contract. The record adequately supports the Board's determination, and contrary to the court of appeals' conclusion, the Board's decision in this case is consistent with its other recent decisions applying the *Indiana & Michigan* rule. The court of appeals therefore erred in refusing to uphold that aspect of the Board's order declining to direct arbitration of the layoff grievances.

ARGUMENT

THE NATIONAL LABOR RELATIONS BOARD REASONABLY DETERMINED THAT THE UNION'S POST-CONTRACT EXPIRATION GRIEVANCES ABOUT THE EMPLOYER'S LAYOFF OF EMPLOYEES WERE NOT ARBITRABLE UNDER THE CONTRACT

A. The Board's Interpretations Of The Act And Exercise Of Remedial Authority Are Entitled To Substantial Deference If They Are Rational And Consistent With The Statute

"The function of striking [the] balance to effectuate national labor policy is often a difficult and delicate responsibility, which Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *NLRB* v. *Truck Drivers*, 353 U.S. 87, 96 (1957); see *NLRB* v. *Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549 (1990); *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 501 (1978). Accordingly, the Board's judgment, when "applying the general provisions of the Act to the complexities of industrial life," *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963), is entitled to "considerable deference," *Curtin Matheson*, 110 S. Ct. at 1549. As this

Court has repeatedly held, "[i]f the Board adopts a rule that is rational and consistent with the Act * * * then the rule is entitled to deference from the courts." *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987); accord *Curtin Matheson*, 110 S. Ct. at 1549; *Charles D. Bonanno Linen Service, Inc.* v. *NLRB*, 454 U.S. 404, 413 (1982); *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 495, 497 (1979); *Beth Israel Hosp.*, 437 U.S. at 500-501.[16]

As this Court has stressed, deference is required when the Board's decisions are based on policy judgments designed to effectuate the broad purposes of the statute. See, *e.g.*, *Curtin Matheson*, 110 S. Ct. at 1542. "It is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy," and if the Board is to accomplish that task it "necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions." *Beth Israel Hosp.*, 437 U.S. at 500-501. Particularly where the Board's policy judgment reflects the agency's " 'difficult and delicate responsibility' of reconciling conflicting interests of labor and management," that judgment "is 'subject to limited judicial review.' " *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975). "The rule which the Board adopts is judicially reviewable for consistency with the Act, and for rationality, but if it satisfies those criteria, the Board's application of the rule, if supported by substantial evidence on the record as a whole, must be enforced." *Beth Israel*

[16]Deference is owed to decisions of the Board even where the Board's position represents a change from prior policy. *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 265-266 (1975) ("To hold that the Board's earlier decisions froze the development of this important aspect of national labor law would misconceive the nature of administrative decisionmaking"), quoted with approval in *Curtin Matheson*, 110 S. Ct. at 1549.

Hosp., 437 U.S. at 501; accord *Curtin Matheson*, 110 S. Ct. at 1549.

Moreover, deference is particularly due the Board's remedial orders. This Court has long recognized that such an order "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943). However, the "Board's 'power to order affirmative relief * * * is merely incidental to the primary purpose of Congress to stop and to prevent unfair labor practices' " and "nothing in the language or structure of the [Act] * * * requires the Board to reflexively order that which a complaining party may regard as 'complete relief' for every unfair labor practice." *Shepard* v. *NLRB*, 459 U.S. 344, 352 (1983).

B. Under These Principles, The Board's Rule Regarding Arbitration Of Post-Contract Expiration Grievances Should Be Upheld

1. This Court has long recognized that the National Labor Relations Act, although not giving the Board authority to remedy all breaches of contract, does vest the Board with power to remedy those breaches that also constitute unfair labor practices. *NLRB* v. *Strong Roofing Co.*, 393 U.S. 357, 360-361 (1969). A breach of contract that repudiates the collective bargaining agreement, in whole or in part, violates Section 8(a)(5) of the Act, where the "renunciation" of the contractual obligation undercuts "the most basic of collective-bargaining principles, the acceptance and implementation of the bargain reached during negotiations." *Nedco Const. Co.*, 206 N.L.R.B. 150, 151 (1973); accord *Sea Bay Manor Home for Adults*, 253 N.L.R.B. 739, 741 (1980), enforced, 685 F.2d 425 (2d Cir. 1982). For that reason, the wholesale repudiation of a con-

tractual agreement to arbitrate grievances constitutes a violation of Section 8(a)(5). See, *e.g.*, *Paramount Potato Chip Co.*, 252 N.L.R.B. 794, 796-797 (1980); *Independent Stave Co.*, 233 N.L.R.B. 1202, 1204 (1977), enforced in pertinent part, 591 F.2d 443, 446-448 (8th Cir.), cert. denied, 444 U.S. 829 (1979); see also note 4, *supra*.

In *Nolde*, this Court held that "termination of a collective-bargaining agreement [does not] automatically extinguish[ ] a party's duty to arbitrate grievances arising under the contract," 430 U.S. at 251, and thus concluded that "where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication," *id.* at 255. As the Board explained in *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 59-60, in view of *Nolde*'s strong presumption that the contractual obligation to arbitrate grievances arising under the contract extends to post-expiration disputes,[17] a blanket refusal to arbitrate post-expiration grievances would violate Section 8(a)(5) and (1) of the Act, absent strong evidence that the parties intended to exclude such disputes from arbitration. Accord *United Chrome Prods., Inc.*, 288 N.L.R.B. 1176 (1988); *Uppco, Inc.*, 288 N.L.R.B. 937 (1988).

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[17] Although *Nolde* involved an action arising under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, the Board has properly looked to that decision for guidance in applying the analogous principles governing collective bargaining under the National Labor Relations Act. Compare *Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368, 374 (1974) ("No obligation to arbitrate a labor dispute arises solely by operation of the [LMRA]. The law compels a party to submit his grievance to arbitration only if he has contracted to do so.") with *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99, 107-109 (1970) (under the NLRA, the Board may not compel agreement on any contract term, even as a remedy for a proven violation of the Act); cf. *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, 256 (1974).

That aspect of the Board's rule regarding the duty to arbitrate post-contract expiration grievances is unexceptionable. As the Board held in *Hilton-Davis Chem. Co.*, 185 N.L.R.B. at 242, and reaffirmed in *Indiana & Michigan Elec. Co.*, "the Act does not impose a duty to adhere to the arbitration procedure independent of any contractual commitment to do so," 284 N.L.R.B. at 58.[18] On the other hand, it is appropriate for the Board to foster the "strong presumption favoring arbitrability" in order to effectuate the federal labor policy favoring arbitration, and the Board is well aware that employers and unions "draft[ ] * * * arbitration clause[s] against a backdrop of [that] well-established * * * policy favoring arbitration as the means of resolving disputes over the meaning and effect of collective-bargaining agreements." *Nolde*, 430 U.S. at 254. The Board therefore has properly embraced the *Nolde* presumption in the context of construing the Section 8(a)(5) duty to bargain. At the same time, the Board has also ensured that such a duty—as applied to arbitration of post-contract expiration grievances--remains grounded on the parties' intentions; the Board has therefore provided that a party may rebut the presumption by an adequate showing that the parties intended to exclude post-contract expiration grievances from arbitration.

2. Similar considerations account for the limited reach of the Board's rule regarding the duty to arbitrate particular post-contract expiration grievances. Under the express terms of the Act, the duty to bargain "does not compel

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[18] For that reason, the doctrine set forth in *NLRB* v. *Katz*, 369 U.S. 736, 743 (1962)—that an employer must maintain the status quo with respect to mandatory subjects of bargaining and refrain from unilateral changes until bargaining to impasse—does not render an employer's failure to arbitrate post-expiration contractual disputes a violation of Section 8(a)(5). See pp. 3-4, *supra*.

either party to agree to a proposal or require the making of a concession." 29 U.S.C. 158(d). And this Court has long recognized that the Board may not compel agreement on any contract term, even as a remedy for a proven violation of the Act. *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99, 107-109 (1970). It follows that the Board, in fashioning the scope of the post-expiration duty to arbitrate grievances, must use as a touchstone the collective bargaining agreement itself. In other words, the Board's authority to order arbitration is limited to those grievances that *arise under* the expired contract, so that the parties may properly be presumed to have agreed to arbitrate them.

In *Nolde*, the Court observed that "the parties' failure to exclude from arbitrability contract disputes arising after termination * * * affords a basis for concluding that they intended to arbitrate all grievances arising out of the contractual relationship." 430 U.S. at 255. However, in order to anchor the implementation of *Nolde* in the source of the duty to arbitrate—the collective bargaining agreement—the Board has rejected the proposition that "the mere invocation of any term of the expired contract triggers the postexpiration duty to arbitrate." *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 60 n.9. The Board, accordingly, has refused to presume—in the absence of contrary evidence—that the parties intend to arbitrate every post-expiration dispute, regardless of subject matter.[19]

[19] Accordingly, the Board has distanced itself from those courts of appeals—like the court below, see Pet. App. A20-A22—that have construed *Nolde* as holding that any post-contract expiration dispute based on the contract is arbitrable, as long as the contract's broad arbitration clause does not explicitly exclude such disputes. See, *e.g.*, *Local Joint Executive Bd., Culinary Workers Union, Local 226* v. *Royal Center, Inc.*, 796 F.2d 1159, 1162-1164 (9th Cir. 1986), cert. denied, 479 U.S. 1033 (1987); *Federated Metals Corp.* v. *United Steelworkers*, 648 F.2d 856, 861 (3d Cir. 1981), cert. denied, 454 U.S. 1031 (1981).

Nonetheless, in citing those decisions, see *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 60, the Board implicitly recognized that each involved a grievance which the Board would likely find arbitrable under the more restrictive approach it follows. In *Royal Center*, the dispute involved alleged violations of a "successorship" clause which, by its nature, could come into play only after the business had been sold and the contract terminated. 796 F.2d at 1163. In *Federated Metals*, the dispute involved eligibility for pension benefits, and turned on whether contractual seniority rights survived expiration of the contract. 648 F.2d at 858, 860.

Rather, the Board has determined that only those post-expiration grievances concerning "contract rights capable of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceable after the contract expires" must be arbitrated under the expired contract. *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 60; see *United Food Workers Union, Local 7* v. *Gold Star Sausage Co.*, 897 F.2d 1022, 1024-1026 (10th Cir. 1990); *Chauffeurs Local Union 238* v. *C.R.S.T., Inc.*, 795 F.2d 1400, 1403 (8th Cir.) (en banc), cert. denied, 479 U.S. 1007 (1986). That limitation stems from the Board's striking the balance between two fundamental principles identified in *Nolde*: (1) the principle that "the arbitration duty is a creature of the collective bargaining agreement and [thus] a party cannot be compelled to arbitrate any matter in the absence of a contractual obligation to do so," 430 U.S. at 250-251; and (2) the "well-established federal labor policy favoring arbitration as the means of resolving disputes over the meaning and effect of collective bargaining agreements," *id.* at 254.

The Board's rule, "[b]y requiring the dispute to relate back, in some meaningful sense, to the time during which the collective bargaining agreement was in force before

deeming it to arise under that agreement," *Gold Star Sausage,* 897 F.2d at 1026, ensures that the contractual roots of the duty to arbitrate are not abandoned. At the same time, the rule recognizes that the presumption favoring arbitrability appropriately applies only to those disputes covered by the terms of the agreement.[20] Indeed, the Board's approach is a reasonable means of effectuating the parties' original intent—the source of the duty to arbitrate. As one court has explained:

> Usually parties have agreed that certain rights, such as pension, disability, seniority and vacation benefits, can accrue or vest during the life of the contract. The realization of some of these rights may be contingent upon a well-defined future event. An employee should not be deprived of already accrued or vested rights on the fortuity that they became ripe for enjoyment following the expiration of the agreement. Such an employee remains entitled to such rights and to the dispute resolution process the parties agreed to use to enforce them. While the substantive right to continue to accrue benefits terminates with the contract, the right to arbitrate disputes regarding benefits which may have already accrued or vested survives.

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[20] The broader rule—that any post-contract expiration dispute based on the contract is arbitrable, as long as the contract's broad arbitration clause does not explicitly exclude such disputes—has not been deemed by the Board to strike an appropriate balance between the labor principles at stake. As the Tenth Circuit has aptly pointed out, that rule

> stresses the policy favoring arbitration at the expense of the policy against forcing arbitration on a party who has not agreed to it. Essentially, it • • • give[s] [a party] an important part of the benefits of a collective bargaining agreement with none of the attendant responsibilities by, in effect, adding an unbargained-for provision to the parties' expired contract.

Gold Star Sausage, 897 F.2d at 1026.

County of Ottawa v. *Jaklinski,* 423 Mich. 1, 23, 377 N.W.2d 668, 677 (1985).

The *Indiana & Michigan* rule reflects the Board's reasonable determination that where a substantive right accrues or vests during the term of the contract, the parties intend that right to survive the expiration of the contract. It is therefore appropriate to presume that the duty to arbitrate a claimed violation of such an accrued right also survives.[21] To hold otherwise would require the Board to assume that the parties intend to preserve the right, yet at the same time eliminate the contractually designated means of enforcing it. On the other hand, where the Board can discern no basis for finding that the parties intend the substantive right at issue to survive the contract's expiration, the Board may reasonably decline to presume that the parties intend to arbitrate that sort of grievance. Given the contractual nature of the duty to arbitrate, the Board certainly need not presume that any party who ever accepts a broad arbitration clause thereby shows an intent to commit itself to arbitration of all disputes "for all time." *Bell Foundry Co.,* 73 Lab. Arb. 1162, 1166 (1979) (Roberts, Arb.).

In sum, the *Indiana & Michigan* rule reflects the Board's "striking [a] balance to effectuate national labor policy." *NLRB* v. *Truck Drivers,* 353 U.S. at 96. The Board's rule

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[21] Arbitrators have long used a similar approach in determining arbitrability of grievances arising after the expiration of a collective bargaining agreement. See, *e.g., Westwood Products,* 77 Lab. Arb. 396, 397 (1981) (Peterschmidt, Arb.) (post-expiration discharges do not involve accrued rights and therefore are not arbitrable); *Alliance Machine Co.,* 74 Lab. Arb. 1058, 1060-1061 (1981) (Feldman, Arb.) (holiday pay is not accrued, but vacation would be accrued); *The Brooklyn Eagle,* 32 Lab. Arb. 156, 161-163 (1959) (Wirtz, Arb.) (to survive expiration and be arbitrable, rights must be "earned" during the contract's term).

furthers the use of arbitration as a means of resolving labor-management disputes, but at the same time seeks to ensure that resort to arbitration over particular disputes ultimately depends on the parties' mutual consent, as reflected in the collective bargaining agreement. In view of the fact that the National Labor Relations Act itself calls for such an accommodation of often competing principles, the Board's rule is plainly "rational and consistent with the Act." *Curtin Matheson,* 110 S. Ct. at 1549 (citing *Fall River Dyeing,* 482 U.S. at 42).

C. The Union's Post-Contract Expiration Grievances Were Not Arbitrable Since They Did Not "Arise Under" The Contract

Under the Board's established doctrine, see pp. 3-4, *supra,* petitioner's blanket refusal here to arbitrate the union's post-contract expiration grievances violated Section 8(a)(5) and (1) of the Act.[22] But that violation, as the

[22] Although the Board had no occasion to address the issue, see Pet. App. B9 n.6, the court of appeals correctly concluded that the fact that the layoffs occurred almost one year after the contract expired did not, in itself, relieve petitioner of any contractual duty to arbitrate. *Id.* at A16 n.8. *Nolde* established no specific time limit beyond which post-expiration grievances are no longer presumed arbitrable. Indeed, imposition of such a limitation here would enable a party in petitioner's position to profit from its own wrongdoing, since the record here shows that petitioner's unlawful refusal to bargain with the union accounted for the lack of a new collective bargaining agreement. See note 10, *supra.* See, *e.g., Auto Workers* v. *Young Radiator Co.,* 904 F.2d 9, 10 (7th Cir. 1990); *Steelworkers* v. *Fort Pitt Steel Casting Division—Conval-Penn, Inc.,* 635 F.2d 1071, 1078 (3d Cir. 1980), cert. denied, 451 U.S. 985 (1981); but see *Teamsters Local 703* v. *Kennicott Bros. Co.,* 771 F.2d 300, 303 (7th Cir. 1985).

Moreover, petitioner was not relieved of its contractual duty to arbitrate any post-expiration grievances by virtue of the fact that the contract's general no-strike clause was limited to the "term of [the] Agreement." J.A. 34. First, the relevance here of that general clause is

Board determined, did not warrant relief in the form of compulsory arbitration. Under the governing rule set forth in *Indiana & Michigan Elec. Co.,* 284 N.L.R.B. at 60, those layoff grievances were not arbitrable since they did not "arise under" the contract. The court of appeals therefore erred in declining to uphold that aspect of the Board's remedial order.

First, as the Board found, petitioner decided to convert to "hot-type" operations—the decision that triggered the layoffs—in July 1980, some nine months after the contract expired. Pet. App. B3, B16. Moreover, a substantial factor in that decision was petitioner's loss of 30 percent of a major customer's business, an event that also took place at that time. See J.A. 108-109. The layoffs thus not only occurred after the contract expired, but also were based entirely on events occurring after that expiration.

Second, as the Board determined, the contractual right asserted by the union in the layoff grievances is not " 'a right worked for or accumulated over time.' " Pet. App. B16 (quoting *Indiana & Michigan Elec. Co.,* 284 N.L.R.B. at 60). Nor did the Board find any evidence that "the parties contemplated that such [a] right[ ] could ripen or remain enforceable even after the contract expired." Pet. App. B16 (quoting *Indiana & Michigan Elec. Co.,* 284 N.L.R.B. at 60). The contract entitled employees to be laid off on the basis of seniority only "if other things such as aptitude and ability are equal." J.A. 30. Accordingly,

undermined by the contract's separate clause forbidding strikes over arbitrable grievances. See *id.* at 34-35. Second, even absent that specific provision, the Board has held that the no-strike obligation tracks the duty to arbitrate, and therefore continues with respect to those post-expiration disputes that remain arbitrable under *Nolde.* See *Goya Foods, Inc.,* 238 N.L.R.B. 1465, 1467 (1978). Third, a similar contention appears to have been implicitly rejected by this Court in *Nolde.* See 430 U.S. at 257 (Stewart, J., dissenting).

any arbitration proceeding would necessarily entail a comparison between the abilities of laid-off employees and other employees as of the date of the layoffs, *i.e.*, after the contract expired, rather than consideration of events occurring, or conditions existing, during the term of the contract. In these circumstances, the Board correctly determined that the layoff grievances at issue did not involve vested or accrued rights and thus did not "arise under" the expired contract.

Despite the Board's straightforward application in this case of the rule adopted in *Indiana & Michigan Elec. Co.*, the court of appeals declined to uphold the Board's order, since it construed the Board's decision as inconsistent with *Uppco, Inc.*, 288 N.L.R.B. 937 (1988), and *United Chrome Prods., Inc.*, 288 N.L.R.B. 1176 (1988). Pet. App. A19-A20 & n.9. The court of appeals was mistaken.

In *Uppco*, the Board found arbitrable a post-expiration grievance over the failure to recall striking employees on the basis of plantwide seniority. Because the contract required all recalls to be based on seniority—defined as length of service with the employer—and specified five circumstances, not including expiration of the contract, under which seniority would be lost, the Board concluded that seniority rights accrued during the term of the contract and that the parties intended that such rights remain enforceable after the contract expired. 288 N.L.R.B. at 940. In *United Chrome Prods.*, the contract again required recalls to be based solely on seniority and defined seniority in terms similar to those involved in *Uppco*. The Board found that the employees' seniority rights "were worked for and accumulated over time, and * * * thus arguably remained enforceable after the contract expired." 288 N.L.R.B. at 1177. The Board also noted that, after the contract had expired, the employer had locked out its employees and then rehired them as new probationary em-

ployees—conduct which the Board found was an unlawful attempt to deprive them of seniority rights. *Id.* at 1176 n.2. The Board viewed this conduct as a tacit admission that the seniority rights survived the contract's expiration. *Id.* at 1177.

This case is not comparable to *Uppco* and *United Chrome Prods.* Here, the contract by its terms makes aptitude and ability the principal criteria for determining an employee's eligibility for layoff, and requires resort to seniority only "if other things such as aptitude and ability are equal." J.A. 30. As the Board pointed out in *United Chrome Prods.*, aptitude and ability are "subjective factors * * * that remain within the control of an employer." 288 N.L.R.B. at 1177. These are also factors that change constantly. Even if the aptitude and ability of two employees remain equal during the contract term, such levels of skill may sharply diverge at the later date, and in the changed circumstances, when the employer makes its layoff decision. Because of this potential for change, the Board has therefore taken the consistent position that the right to have layoff decisions made principally on the basis of aptitude and ability does not vest or accrue during the term of the contract.[23]

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[23] The court of appeals rejected this harmonizing of the Board's decisions, stating that "[t]his is not a distinction made by the Board, and we do not know whether the Board would impose such a distinction." Pet. App. A20 n.9. In *United Chrome Prods.*, however, the Board explicitly distinguished this case on the ground explained above:

> Unlike the expired contract in *Litton*, * * * the expired contract here provides for recall solely in terms of seniority and does not include more subjective factors such as "aptitude" and "ability" that remain within the control of an employer.

288 N.L.R.B. at 1177. The court of appeals' order remanding the case to the Board for further explanation was therefore unwarranted. See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality opinion).

CONCLUSION

The judgment of the court of appeals concerning the Board's order declining to direct arbitration of the grievances should be reversed.

Respectfully submitted.

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DECEMBER 1990

★ U.S. GOVERNMENT PRINTING OFFICE: 1990 – 282-061/20271